Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

STATE OF ILLINOIS,

Petitioner,

v.

RICHARD C. NITZ,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of Illinois

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

If a criminal defendant, whose competence to stand trial was not raised during trial but who reveals substantially after trial that during those proceedings he had voluntarily ingested psychotropic medication prescribed for him by jail staff, does the Due Process Clause require, pursuant to *Pate v. Robinson*, 383 U.S. 375 (1966) and *Drope v. Missouri*, 420 U.S. 162 (1975), the automatic reversal of the defendant's conviction if the trial judge failed to invoke at trial a state statutory provision entitling defendants taking psychotropic drugs to a fitness hearing?

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OPINIONS BELOW

The March 28, 1991, decision of the Illinois Supreme Court affirming Nitz's convictions and sentence on direct review is published at 143 Ill. 2d 82, 572 N.E.2d 895 (Ill. 1991). The June 2, 1996, decision of the Illinois Supreme Court reversing the state post-conviction court's denial of relief is published at 173 Ill.2d 151, 670 N.E.2d 672 (Ill. 1996), and is reprinted in the appendix to this petition.

JURISDICTION

The Supreme Court of Illinois entered its judgment on June 20, 1996. On September 30, 1996, the court denied the petition for rehearing filed by the State of Illinois. That order is reprinted in the appendix to this petition. Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. amend. XIV:

No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . .

725 Ill. Comp. Stat. 5/122-1 (West 1992):

§ 122-1. Petition in the trial court. Any person imprisoned in the penitentiary who asserts that in the proceedings which resulted in his conviction there was a substantial denial of his rights under the Constitution of the United States or of the State of Illinois or both may institute a proceeding under this Article.

Ill Rev. Stat. ch. 38, para. 104-11(a) (1987) (now codified as 725 Ill. Comp. Stat. 5/104-11(a)):

§ 104-11. Raising Issue; Burden; Fitness Motions.

(a) The issue of the defendant's fitness for trial, to plead, or to be sentenced may be raised by the defense, the State or the Court at any appropriate time before a plea is entered or before, during, or after trial. When a bona fide doubt of the defendant's fitness is raised, the court shall order a determination of the issue before proceeding further.

Ill. Rev. Stat. ch. 38, para. 104-21(a) (1987) (now codified as 725 Ill. Comp. Stat. 5/104-21(a)):

§ 104-21. Medication. (a) A defendant who is receiving psychotropic drugs or other medications under medical direction is entitled to a hearing on the issue of his fitness while under medication.

STATEMENT OF THE CASE

I. Nitz's Criminal Trial, Sentencing Hearing and Direct Appeal.

A Williamson County grand jury returned a 12-count indictment against Respondent Richard C. Nitz, charging him with three counts of first degree murder (Ill. Rev. Stat. ch. 38, para. 9-1(a)(1), (a)(2) (1987)); one count of unlawful use of weapons by a felon (Ill. Rev. Stat. ch. 38, para. 24-1.1(a) (1987)); and two counts of felony murder in that he caused the death of Michael Miley while committing forcible felonies, aggravated kidnapping and robbery (Ill. Rev. Stat. ch. 38 para. 9-1(a)(3) (1987)). The unlawful use of weapons charge was later dismissed and

a jury subsequently found Nitz guilty of murder. Nitz waived his right to a jury for the sentencing phase of the proceedings, and the trial court found him eligible for the death penalty because he was at least 18 years of age at the time of the murder and because he committed first degree murder while committing the offenses of aggravated kidnapping and robbery. (Ill. Rev. Stat. ch. 38, para. 9-1(b)(6) (1987)). At the second stage of the sentencing hearing, the trial court found no mitigating factors sufficient to preclude imposition of the death penalty and, consequently, sentenced Nitz to death.

Testimony at trial revealed that the victim, Michael Miley—whose headless body was found inside the trunk of his own car—was a member of the homosexual community in the Carbondale area of Illinois. As such, he occasionally visited two places where homosexuals frequently gathered: the Two Hearts Bar in Carbondale and the Crab Orchard Lake area east of Carbondale. Trial testimony also showed that Respondent Nitz severely disliked homosexuals, causing him to frequently harass and verbally assault the homosexuals gathering at Crab Orchard Lake.

The major evidence against Nitz showed that on the night of April 6, 1988, the last night the victim was seen alive, Nitz and his wife drove up to the their trailer home followed by another vehicle containing a young, white male who exited the car and walked up to the front steps. Nitz shouted to the man to "get off of his property or he was going to kill him," and called him a "fucking faggot." Nitz then took a baseball bat from his car and struck the man on the head several times. When the man fell to the ground, Nitz and his wife lifted him into the trunk of his car. Mrs. Nitz then drove off in the

car following behind Nitz who was driving his wife's car. Over the next several weeks, Nitz told two different individuals that he had shot a "faggot" in the head and then decapitated the body in order to conceal the "ballistics" evidence. Nitz was also identified as the man who used several of the victim's credit cards on April 7 and 8, 1988, and upon a search of Nitz's trailer later that month, several of the victim's personal effects were discovered.

At the time of Nitz's trial, as well as currently under state law, the trial court must order a determination of a defendant's fitness to stand trial when a *bona fide* doubt of fitness is raised by the defense, the State or the court at any appropriate time before a plea is entered or before, during, or after trial. Ill. Rev. Stat. ch. 38, para. 104-11(a) (1987) (now codified as 725 Ill. Comp. Stat. 5/104-11(a)). Once the issue has been raised, the burden of proving that the defendant is fit by a preponderance of the evidence and the burden of going forward with the evidence are on the State. *Id.*, para. 104-11(c).

The issue of Nitz's fitness to stand trial was never raised at trial. Instead, the defense sought to establish that someone other than defendant had murdered the victim. Nitz also failed to raise the fitness issue on direct review of his convictions and sentence, which were affirmed by the Illinois Supreme Court in *People v. Nitz*, 143 Ill. 2d 82, 572 N.E.2d 895 (Ill. 1991).

II. Nitz's State Post-Conviction Proceedings and Appeal.

Four years after trial, Nitz's post-conviction counsel learned that his client—whose trial had taken place be-

tween August 31, 1988 and October 25, 1988—was administered the drug Tranxene[1] during that time period. Specifically, records obtained from the Williamson County Sheriff indicated that an unspecified dosage of the drug was administered to Nitz three times daily—once in the morning, again at midday, and a third time in the evening—beginning July 16, 1988. After the morning dosage on August 29, 1988, no medication was recorded as having been given until September 2, 1988, when daily administration was resumed. No medication was given on the morning of September 27, 1988 and it was "refused" on the evenings of October 13, 19, 20, and from October 22 through 24, 1988. No entries appear in the records beyond the morning dosage administered on October 28, 1988.

There is no indication that the trial judge or the prosecutors were aware that Nitz was taking the medication. Nitz's trial counsel was also unaware of the administration of the drug. Nitz himself asserted on post-conviction review that he did not remember being given the medication, but has never claimed that he was forcibly medicated.

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[1] Tranxene is approved for use in the short-term management of anxiety, adjunctive therapy in the management of partial seizures, and symptomatic relief of acute alcohol withdrawal. *Physician's Desk Reference* 459 (51st ed. 1997). The side effect most frequently reported is drowsiness. *Id.* at 460. Less commonly reported (in descending order of occurrence) are: dizziness, various gastrointestinal complaints, nervousness, blurred vision, dry mouth, headache, and mental confusion. *Id.* Other side effects include insomnia, transient skin rashes, fatigue, ataxia, genitourinary complaints, irritability, diplopis, depression and slurred speech. *Id.*

During the collateral attack on his convictions and sentence, Nitz alleged that because the State did not inform his trial counsel that he was being administered psychotropic medication throughout the course of his trial, he was deprived of his constitutional due process right to a fitness hearing. The trial judge summarily dismissed Nitz's petition for post-conviction relief, ruling that this and his other claims were barred by the doctrines of *res judicata* and waiver.

Nitz appealed the dismissal of his post-conviction petition to the Illinois Supreme Court. He claimed not only that he was deprived his constitutional right to a fitness hearing because the State failed to inform trial counsel that he was medicated throughout trial, but also that Illinois Revised Statutes, ch. 38, para. 104-21(a), which entitles defendants taking psychotropic drugs to a fitness hearing, "itself embodies the constitutional right to a fair trial and the due process of law guarantee." (Brief of Petitioner-Appellant at 14). Nitz did not claim that he was actually unfit to stand trial.

A majority of the Illinois court rejected the State's argument that the failure to afford Nitz a fitness hearing amounted to merely a violation of a state statutory provision, not cognizable under the Illinois Post-Conviction Hearing Act which requires an allegation of a deprivation of constitutional rights. Instead, relying upon the Due Process Clause of the Fourteenth Amendment to the United States Constitution,[2] the majority found that

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[2] The Illinois court relied exclusively upon the Due Process Clause of the Fourteenth Amendment to the United States Constitution. At no time did the court refer to Article I, Sec-

(continued...)

because Nitz had taken Tranxene during the course of his trial, the trial court's failure to invoke the state statutory provision entitling defendants taking psychotropic drugs to a fitness hearing, resulted in a *per se* violation of the defendant's federal constitutional right to inquiry into the issue of his competence under *Pate v. Robinson*, 383 U.S. 375 (1966).[3] In the dissent, Justice Miller, joined by two other Justices including the Chief Justice, expressed their continued belief that the right to a fitness hearing under §104-21(a) is merely "statutory rather than constitutional in force and effect." (App. 15).

The Illinois court denied the State's petition for rehearing without comment on September 30, 1996. On October 1, 1996, the court stayed its mandate pending the filing and disposition of a petition for writ of certiorari.

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[2] (...continued)
tion 2 of the Illinois Constitution, which provides that "[n]o person shall be deprived of life, liberty or property without due process of law. . . ."

[3] Given the majority's determination that Nitz was entitled to a new trial based on a violation of his right to inquiry on the issue of his fitness, it did not address his claim that the State had violated *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to inform defense counsel about the administration of the Tranxene.

REASONS FOR GRANTING THE WRIT

The concept of state sovereignty is sacred to those who prosecute criminal offenders in the State of Illinois. Also venerated, however, is the finality of criminal convictions. Accordingly, when a state court acts, on the basis of an incorrect interpretation of federal constitutional law, to frustrate that interest on so large a scale as it has in connection with the issue in this case, the interest of justice requires that the federal judiciary intervene.

This petition should be granted because a majority of the Illinois Supreme Court has decided a substantial federal question in a way that conflicts with applicable decisions of this Court, including *Pate v. Robinson*, 383 U.S. 375 (1966), *Drope v. Missouri*, 420 U.S. 162 (1975) and *Riggins v. Nevada*, 504 U.S. 127 (1992). Moreover, the reasoning of the majority differs markedly from that in decisions of several United States courts of appeals.

While the majority's decision in this case is only binding on the Illinois judicial system, it, along with its antecedent, is not only having an enormous impact statewide, but has the potential for national impact as well.

Recently, the Illinois Attorney General's Office distributed a questionnaire to the various county state's attorneys in Illinois, in an attempt to ascertain what effect the state supreme court's decisions in this line of cases was having in the state. The results were staggering. The questionnaire revealed that thus far, defendants in approximately 71 cases—either on direct appeal, state post-conviction review, federal habeas corpus review, or during proceedings to vacate guilty pleas—have raised colorable claims that their convictions or sentences should be reversed because they were not afforded fit-

ness hearings under §104-21(a), consistent with the majority's reasoning in the case at bar and its antecedent. (App. 18-25). Twenty-two of those cases are capital cases and, of those 22 capital cases, three involve defendants who were convicted in the early 1980s and who have already exhausted, or are very close to exhausting all of their standard state and federal appeals. *See also* Maurice Possley, *Mental Fitness Exams Taxing Court System*, CHI. TRIB., October 7, 1996, § 2 at 1. (App. 26-31).

Moreover, as this Court has previously noted, " '[p]sychotropic medication is widely accepted within the psychiatric community as an extraordinarily effective treatment for both acute and chronic psychoses, particularly schizophrenia.' " *Washington v. Harper*, 494 U.S. 210, 226, n. 9 (1990). Considering along with that fact that " 'approximately 70% of all Death Row prisoners are diagnosed with schizophrenia or psychosis,' "[4] and that "the whole subject of treating incompetence to stand trial by drug medication is somewhat new to the law,"[5] federal courts and other state courts may very well look to the Illinois court's reasoning when struggling with issues relating to the federal constitutional rights of criminal defendants taking psychotropic drugs during trial.

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[4] Keith Alan Byers, *Incompetency, Execution, and the Use of Antipsychotic Drugs*, 47 ARK. L. REV. 361, 375 (1994), quoting Nancy S. Horton, Comment, *Restoration of Competency for Execution: Furiosus Solo Furore Punitur*, 44 SW. L.J. 1191, 1204 (1990).

[5] *Riggins v. Nevada*, 504 U.S. at 138 (Kennedy, J., concurring).

I.

THIS COURT SHOULD GRANT CERTIORARI TO CORRECT A SERIOUS MISINTERPRETATION OF FEDERAL CONSTITUTIONAL LAW.

A majority of the Illinois Supreme Court has held that if a criminal defendant, at or near the time of trial, voluntarily ingests psychotropic drugs prescribed for him by jail staff, the trial court's failure to invoke a state statutory provision entitling defendants taking psychotropic drugs to a fitness hearing, results in a *per se* violation of the defendant's federal constitutional right to inquiry into the issue of his or her competence under *Pate v. Robinson* and *Drope v. Missouri*. The majority reasoned that because evidence that a defendant has taken psychotropic drugs—even if not discovered until after trial—"is an important signal that [he or she] may not be competent to stand trial," and also because such drugs "have severe side effects which can affect a defendant during criminal proceedings,"[6] an "automatic reversal" rule is necessary in order to adequately safeguard such a defendant's right not to be tried while unfit. (App. 13). If allowed to stand, the decision below clears the way for potentially hundreds of convicted criminals to obtain new trials or sentencing hearings. This Court should prevent such a calamity by reversing the incorrect decision below.

A. Evolution of the "Automatic Reversal" Rule.

In 1979, the Illinois General Assembly passed Illinois Revised Statutes ch. 38, para. 104-21(a), the state statu-

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[6] *People v. Gevas*, 166 Ill. 2d 461,470, 655 N.E.2d 894, 899 (1995).

tory provision in question. Section 104-21(a) provided that a defendant receiving psychotropic drugs or other medications under medical direction is entitled to a hearing on the issue of his fitness while under medication.[7] Since its enactment, the provision has been interpreted in several Illinois Appellate Court opinions which took the view that a defendant's ingestion of psychotropic medication was but one factor in the trial court's *bona fide* doubt analysis, and that the legislature did not intend to remove the right of a trial judge to exercise all discretion when he or she is possessed of sufficient information to assure that the particular defendant is fit to stand trial. *See People v. Lopez*, 216 Ill. App. 3d 83, 87-88, 576 N.E. 2d 246, 248 (1991); *People v. Balfour*, 148 Ill. App. 3d 215, 226, 498 N.E. 2d 547, 556 (1986); *People v. Tilson*, 108 Ill. App. 3d 973, 978, 439 N.E. 2d 1298, 1301 (1982).

For the first time in 1994, the Illinois Supreme Court interpreted the language of §104-21(a). A majority of the court held that the language used in the provision, given its plain and ordinary meaning, "evinces a recognition by the Illinois General Assembly that psychotropic medication is an important signal that a defendant may not be

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[7] In 1995, the Illinois General Assembly amended this statutory provision to require that judges have a *bona fide* doubt about the fitness of a defendant who is taking psychotropic medication before ordering a fitness hearing. Pub. Act 89-428, § 605, eff. December 13, 1995. In May of 1996, however, a judge of the Circuit Court of Cook County found that Pub. Act 89-428 violated the "single-subject" rule of the Illinois Constitution and his ruling is currently on appeal. A new draft of the amendment, still incorporating the *bona fide* doubt language, is expected to be signed by the Governor in December of 1996.

competent to stand trial." *People v. Brandon*, 162 Ill. 2d 450, 457, 643 N.E.2d 712, 715 (1994). Accordingly, the majority concluded that a fitness hearing under §104-21(a) is mandatory and not subject to the trial court's discretion.

Less than a year later in *People v. Gevas*, 166 Ill. 2d 461, 655 N.E.2d 894 (1995), the majority affirmed its prior holding in *Brandon*. In *Gevas*, however, the majority expressed its own concern with the treatment of a defendant with psychotropic drugs. Relying on Justice Kennedy's concurring opinion in *Riggins*, 504 U.S. at 143-44 (Kennedy, J., concurring), the Illinois justices stated:

> We further note that the legislature's concern with the treatment of a defendant with psychotropic drugs is substantial. Not only does the administration of these drugs signal that a defendant may not be competent to stand trial, these drugs also have severe side effects which can affect a defendant during criminal proceedings.

166 Ill. 2d at 470, 655 N.E.2d at 899.

Later that year, in *People v. Kinkead*, 168 Ill. 2d 394, 660 N.E.2d 852 (1995), the majority reaffirmed its holdings in *Brandon* and *Gevas*. It remanded for further proceedings, however, for inquiry into whether the psychotropic drug "was proximate enough in time to [the] defendant's guilty plea" to determine that defense counsel's failure to request a fitness and the court's failure to hold such hearing had in fact denied defendant "due process of law." 168 Ill. 2d at 414, 660 N.E.2d at 861.

Not until the case at bar did the majority expound on precisely why it believed the failure to afford a defendant

a fitness hearing under §104-21(a) deprives him of his rights under the Due Process Clause. In doing so, the majority cited this Court's decisions in *Pate* and *Drope v. Missouri* in holding that even though the right to a fitness hearing under §104-21(a) is wholly a state statutory right, the "right to inquiry concerning fitness flows from the due process guarantee," and "because no procedure was invoked, [Nitz] was denied inquiry into the issue of his fitness." (App. 4, 8-10). The justices also acknowledged that §104-21(a) has since been amended to provide that no fitness hearing is required unless the trial court finds that there is a *bona fide* doubt of the defendant's fitness, and conceded that "the General Assembly can pass legislation to prospectively change a judicial construction of a statute if it believes that the judicial interpretation was at odds with legislative intent."[8] (App.

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[8] To be sure, when the General Assembly amended §104-21(a) in 1995, the majority lost major footing in its theory that the Illinois legislature considered psychotropic medication an important signal that a defendant may be unfit for trial. The transcription of the House debates on the Bill effecting the change indicates the following:

> [W]e're focusing in on the fitness statute about the psychotropic drug exception. Something which I have seen over the past two years, catastrophic effects in the Supreme Court; [they] are reversing terrible, terrible murder cases and reversing capitol [sic] cases, especially in Cook County. One especially, David 'Geavs' [sic], who decided to kill his two twin ten year olds about three years ago by whipping them up against the wall like rag dolls. He is now . . . he was sentenced to death. That case has been reversed because of a loophole in the fitness statute. That's what we're addressing in this Bill.

89th Gen. Assembly - House of Representatives, SB 721 (daily ed. Nov. 16, 1995) (statement of Rep. Durkin at pp. 39-40).

11). The majority did not, however, modify its previous holdings which declare that in enacting §104-21(a), the Illinois legislature equated the administration of psychotropic drugs to a defendant with a *bona fide* doubt as to fitness to stand trial.

The majority also brushed aside the State's arguments that there was no evidence before the trial court suggesting that Nitz might be incompetent to stand trial, and that the record was devoid of any indication that either the trial judge or defense counsel noted anything unusual about Nitz's deportment during trial. (App. 10). It also summarily rejected the State's suggestion that the defendant should be required to make a showing of prejudice and that, therefore, instead of reversing the defendant's conviction, it should order a limited remand for the purpose of conducting factfinding on the issue of the nature and properties of the drug involved, its dosage, and its effect on the defendant's ability to understand and participate in his defense. In rejecting this argument, the justices noted the " 'inherent difficulties' in attempting a retrospective '*nunc pro tunc* determination' of defendant's mental competency,' " and concluded that "not even our greater interest in the finality of judgments can outweigh the safeguarding of a defendant's right not to be tried while unfit." (App. 13).

B. The Majority's Decision Was Based on a Misinterpretation of this Court's Rulings in *Pate v. Robinson*, 383 U.S. 375 (1966), and *Drope v. Missouri*, 420 U.S. 162 (1975).

It is axiomatic that a criminal defendant who is mentally incompetent has a substantive due process right not

to be required to stand trial. *Pate*, 383 U.S. at 385. The procedural due process issue in this case is whether Illinois has adequately protected the aforesaid substantive due process right of an accused who has voluntarily ingested psychotropic medication during the course of trial.

Although a majority of the Illinois court was correct in holding that, generally, a trial court's failure to employ state procedures to protect against the trial of an incompetent defendant violates procedural due process, the justices seriously erred in concluding that, under *Pate* and *Drope*, a defendant's federal constitutional right to inquiry into his competence requires a *per se* rule invalidating the conviction of any defendant who was administered a psychotropic drug proximate enough in time to trial to trigger a fitness hearing under a provision of state law. That holding, which effectively mandates under the federal Constitution any fitness procedure provided under state law, is based on a serious misinterpretation of both *Pate* and *Drope*.

It is well established that procedures of the fitness provisions of the Illinois Code of Criminal Procedure are not themselves mandated by the federal Constitution. *Drope*, 420 U.S. at 172; *Balfour v. Haws*, 892 F.2d 556, 561 (7th Cir. 1989). The Constitution does require, however, that the State afford the criminal defendant, on whose behalf a plea of incompetence is asserted, a *reasonable opportunity* to demonstrate that he or she is not competent to stand trial. *Medina v. California*, 505 U.S. 437, 445 (1992) (emphasis added).

As previously noted, at the time of Nitz's trial and currently under Illinois law, a trial court must order a de-

termination of a defendant's fitness to stand trial when a *bona fide* doubt of fitness is raised by the defense, the State or the court at any appropriate time before a plea is entered or before, during, or after trial. Ill. Rev. Stat. ch. 38, para. 104-11(a) (1987) (now codified as 725 Ill. Comp. Stat. 5/104-11(a). Once the issue has been raised, the burden of proving that the defendant is fit by a preponderance of the evidence and the burden of going forward with the evidence are both on the State. *Id.*, para. 104-11(c).

This Court has explicitly recognized that Illinois law affords criminal defendants a reasonable opportunity to demonstrate their incompetence to stand trial. In *Pate*, the Court stated that Illinois "jealously guards" an incompetent defendant's right not to stand trial. 383 U.S. at 385. Moreover, in *Drope*, the Court found that Illinois' procedures for making a competency evaluation were constitutionally adequate, if followed. 420 U.S. at 172.

Nitz has never claimed, and the majority of the Illinois court did not find, that the procedures expressly approved by this Court in *Pate* and *Drope*, which are codified under state law, were not followed in his case. Nonetheless, the majority found that pursuant to those cases, Nitz's federal constitutional rights had been violated. This Court should grant certiorari to correct this erroneous interpretation of federal constitutional law.

The majority's reliance on *Pate* and *Drope* was misplaced from the outset. First, unlike in both of those cases, here there was absolutely no evidence of incompetence raised before the trial court. The fact that Nitz was on Tranxene during trial was not raised until four years after he was convicted and sentenced. This Court empha-

sized in *Drope* that the issue there and in *Pate* was "*whether, in light of what was then known*, the failure to make further inquiry into petitioner's competence to stand trial, denied him a fair trial." 420 U.S. at 174-75 (emphasis added). That language led the United States Court of Appeals for the Fifth Circuit to hold that post-trial evidence of alleged incompetence does not retrospectively render an otherwise fair criminal trial in violation of procedural due process. *Reese v. Wainwright*, 600 F.2d 1085, 1091-93 (5th Cir. 1979). The United States Court of Appeals for the Seventh Circuit adopted the Fifth Circuit's reasoning three years later in *United States ex rel. Rivers v. Franzen*, 692 F.2d 491, 497-98 (7th Cir. 1982). That court noted that "[i]t is open to a defendant to assert his actual incompetence at trial in a subsequent collateral proceeding based on post-trial evidence, but that claim is entirely separate and distinct from a claim of procedural error under *Pate*." *Id.* at 497 n. 3. *See also Tiller v. Esposito*, 911 F.2d 575, 576 (11th Cir. 1990) and *Collins v. Housewright*, 664 F.2d 181, 183 (8th Cir. 1981) (per curiam) (both following *Reese*).

Second, the majority's misunderstanding of *Pate* led to its refusal to consider that neither defense counsel nor the trial judge—after observing Nitz both before and during his trial at which he even testified—made any indication in the record to suggest that Nitz's competence to stand trial might be at issue.[9] (App. 10). In both *Pate*

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[9] In fact, defense counsel affirmatively stated on the record during the hearing on Nitz's post-sentencing motion that there was no indication that Nitz was "under the influence of anything" or incoherent at the time he made his decision to waive a jury for purposes of sentencing.

and *Drope*, this Court criticized only an appellate court's reliance on a defendant's demeanor or mental alertness during trial as justification for ignoring evidence suggesting incompetence which had come to light during trial. *Drope*, 420 U.S. at 179; *Pate*, 383 U.S. at 385. In neither case did the Court generally ban the use of demeanor evidence, or the representations of counsel regarding the state of mind of their clients, in cases raising the issue of denial of due process for failure to conduct a fitness hearing. To the contrary, in *Drope* the Court stated:

> The import of our decision in *Pate v. Robinson* is that evidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant in determining whether further inquiry is required.

420 U.S. at 180. *See also Medina*, 505 U.S. at 450 (stating that "defense counsel will often have the best-informed view of the defendant's ability to participate in his defense"); *Maggio v. Fulford*, 462 U.S. 111, 116-17 (1983) (per curiam) (reversing court of appeals for refusing to accept trial court's competency determination which was based in part on "[t]he trial judge's observation of [defendant's] conduct both prior to and during trial"); and *Balfour v. Haws*, 892 F.2d at 561 (stating that "[c]ounsel, perhaps more than any other party or the court, is in a position to evaluate a defendant's ability to understand the proceedings . . . .").

Illinois further notes that in disregarding the fact that there was no evidence of incompetence before the trial court, the majority of the Illinois court not only eviscerated an essential component of the holdings in *Pate* and *Drope*, but also improperly placed its entire focus on

simply whether there should have been a fitness hearing under state law. In doing so, the majority confused what is required under the federal Constitution with what a defendant may have been entitled to under state law. Moreover, its reasoning conflicts with that of the United States Court of Appeals for the Seventh Circuit in a recent case. Finding that the denial of a fitness hearing can be harmless under *Strickland v. Washington*, 466 U.S. 668 (1984), the Seventh Circuit reasoned in *Eddmonds v. Peters*, 93 F.3d 1307 (7th Cir. 1996) (*reh'g denied* Nov. 5, 1996), that "a fitness hearing is not an end in itself. Its function is to ensure that the defendant is competent to assist in his own defense at trial." *Id.* at 1316. Indeed, the question is not simply whether there should have been a fitness hearing under state law, but whether there is evidence indicating that the defendant was actually tried while unfit in violation of due process of law.

C. *Riggins v. Nevada*, 504 U.S. 127 (1992), Cannot be Construed to Mean that Administration of Psychotropic Medication to a Defendant During Trial, In and of Itself, Signals a Substantial Probability that He or She Was Unfit to Stand Trial.

Not even its reliance on language from this Court's decision in *Riggins v. Nevada* entitled the majority of Illinois court to conclude that failure to make further inquiry into the competency of a defendant, voluntarily taking psychotropic drugs at or near the time of trial, results in a *per se* violation of his or her federal constitutional rights. In *Riggins*, it was held that a defendant being given psychotropic medication, for the purpose of

rendering him competent to stand trial, was denied a fair trial. Although both the majority, and Justice Kennedy in his concurring opinion, recognized in *Riggins* the possibility that antipsychotic drugs can have side effects that impact a defendant's outward appearance or the ability to participate in his defense, integral to both the majority and concurring opinions was the fact that the defendant was forcibly administered the medication. The majority concluded that the lower court had not acknowledged the defendant's liberty interest in freedom from unwanted antipsychotic drugs, and that this error may well have impaired the constitutionally protected trial rights the defendant invoked. 504 U.S. at 137. *Riggins*, therefore, cannot be construed to mean that the administration of psychotropic medication to a defendant during trial, in and of itself, indicates a substantial probability that the defendant's right not to be tried while unfit was violated.

A more appropriate analytical approach in determining whether a violation of the federal Constitution has occurred in a case involving the voluntary administration of psychotropic drugs is that set forth in *Estelle v. Williams*, 425 U.S. 501 (1976), where this Court considered whether prison garb which the State had required the defendant to wear during trial had denied him a fair trial by making his appearance less favorable to the jury. *Id.* at 503. The Court held that although the State cannot, consistently with the Fourteenth Amendment, compel an accused to stand trial before a jury while dressed in identifiable prison clothes, the failure of the defendant to make an objection to the court as to being tried in such clothes, is sufficient to negate the presence of com-

pulsion necessary to establish a constitutional violation. 425 U.S. at 512-13. The Court's explanation for the judicial focus upon compulsion was that "instances frequently arise where a defendant prefers to stand trial before his peers in prison garments[,]" such as when, for example, he hopes to "elicit[ ] sympathy from the jury." 425 U.S. at 508. Likewise, in many cases where a criminal defendant is facing serious felony charges, he may very well desire to be on psychotropic medication, not only to help him get through the ordeal of trial, but simply because it makes him feel better. Rewarding such a defendant with a new trial grants an undeserved premium to a factually guilty individual who was fortunate enough to have been prescribed the medication he desired to improve his sense of well-being, but which may also have in fact enhanced his cognitive ability, rather than impaired it.[10] This Court's grant of certiorari would allow it to settle the question of whether the trial of a defendant, who has voluntarily ingested antipsychotic drugs, has adverse implications on the right to a fair trial.

CONCLUSION

The decision of the majority of the Illinois Supreme Court not only contravenes this Court's precedent and incorrectly resolves questions concerning the due process rights of defendants who voluntarily ingest psychotropic

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[10] Psychotropic medication is "a powerful tool for inducing (rather than impairing) competence. Brief Amicus Curiae of the American Psychiatric Association at 9, *Riggins v. Nevada*, 504 U.S. 127 (1992) (No. 90-8466). *See also Riggins*, 504 U.S. at 150 (Thomas, J., dissenting).

drugs during trial, but, most disturbing of all, it also wrongly gives a colorable claim to potentially hundreds of convicted criminals. Accordingly, the Court should issue a writ of certiorari.

Respectfully submitted,

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APPENDICES

APPENDIX A

173 Ill. 2d 151; 670 N.E.2d 672; 1996 Ill. LEXIS 79;
218 Ill. Dec. 950

SUPREME COURT OF ILLINOIS
Docket No. 77549

THE PEOPLE OF THE STATE OF ILLINOIS,

Appellee,

v.

RICHARD C. NITZ,

Appellant.

June 20, 1996, FILED

JUSTICE FREEMAN delivered the opinion of the court:

Following a jury trial in the circuit court of Williamson County, defendant, Richard Nitz, was convicted of murder, aggravated kidnapping and robbery. Defendant was sentenced to death for the murder conviction. On direct appeal, this court affirmed defendant's convictions and sentences. *People v. Nitz*, 143 Ill. 2d 82, 157 Ill. Dec. 431, 572 N.E.2d 895 (1991). A subsequent petition for *certiorari* to the United States Supreme Court was denied. *Nitz v. Illinois*, 502 U.S. 927, 116 L. Ed. 2d 283, 112 S. Ct. 344 (1991). Thereafter, defendant filed a petition seeking relief pursuant to the Post-Conviction Hearing Act. 725 ILCS 5/122-1 *et seq.* (West 1992). The petition was dismissed without an evidentiary hearing.

Because defendant was sentenced to death for the underlying murder conviction, the present appeal lies directly to this court. 134 Ill. 2d R. 651(a). For reasons that follow, we now reverse.

Defendant's convictions stem from the 1988 murder of Michael Miley. The particular facts surrounding the offenses for which defendant was convicted and sentenced are recounted in *Nitz,* 143 Ill. 2d 82, 157 Ill. Dec. 431, 572 N.E.2d 895, and restatement is unnecessary here.

In his petition for post-conviction relief, defendant asserted several claims which, he maintained, required the trial court either to grant him an evidentiary hearing or a new trial. The circuit court determined that defendant's claims were either waived or barred by *res judicata* and dismissed the petition.

We find a basis to reverse on a single one of defendant's claims. We, therefore, limit our discussion to that particular claim.

A proceeding filed under the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 1992)) is not an [*155] appeal. Rather, the proceeding is a collateral attack on a prior conviction and sentence. *People v. Mahaffey,* 165 Ill. 2d 445, 452, 209 Ill. Dec. 246, 651 N.E.2d 174 (1995). The scope of the proceeding is limited to constitutional matters involved in the underlying conviction which have not been, and could not have been, previously adjudicated. *People v. Whitehead,* 169 Ill. 2d 355, 370, 215 Ill. Dec. 164, 662 N.E.2d 1304, (1996). Accordingly, determinations of the reviewing court on direct appeal are *res judicata* as to issues actually decided and issues that could have been raised on direct appeal, but were

not, are waived. *People v. Coleman,* 168 Ill. 2d 509, 522, 660 N.E.2d 919, 214 Ill. Dec. 212 (1995).

In this appeal, defendant contends, *inter alia*, that he is entitled to a new trial because the State withheld information that it was administering psychotropic medication to him throughout the course of his trial and sentencing. The State's failure to disclose this information deprived him of his constitutional due process right to a fitness or competency hearing. Defendant presents two separate bases, either of which, he maintains, support reversal of his convictions and the grant of a new trial. Prior to addressing the particular arguments, we consider the nature and scope of the due process right in the context of an accused's competency to stand trial.

The due process clause of the fourteenth amendment prohibits the prosecution of a person who is unfit to stand trial. U.S. Const., amend. XIV; see also *Medina v. California*, 505 U.S. 437, 120 L. Ed. 2d 353, 112 S. Ct. 2572 (1992); see also *People v. Eddmonds,* 143 Ill. 2d 501, 512, 161 Ill. Dec. 306, 578 N.E.2d 952 (1991). A defendant is considered unfit to stand trial if, because of a mental or physical condition, he is unable to understand the nature and purpose of the proceedings against him or to assist in his defense. *Eddmonds,* 143 Ill. 2d at 512. As Justice Kennedy recently emphasized, "competence to stand trial is rudimentary, for upon it depends the main part of those rights deemed [*156] essential to a fair trial, including the right to effective assistance of counsel, the rights to summon, to confront, and to cross-examine witnesses, and the right to testify on one's own behalf or to remain silent without penalty for doing so." *Riggins v. Nevada*, 504 U.S. 127, 139-40, 118 L. Ed. 2d 479, 492, 112 S. Ct. 1810, 1817 (1992) (Kennedy, J., con-

curring). Absent facts which raise a *bona fide* doubt of fitness, there is an abiding presumption that a defendant is fit to stand trial. *Eddmonds*, 143 Ill. 2d at 512.

Part and parcel of the right not to be tried while unfit is the right to have an inquiry concerning fitness. More specifically, where there is information available to raise the possibility that an accused is incompetent, the failure to inquire concerning competency violates the accused's due process rights. *Pate v. Robinson*, 383 U.S. 375, 15 L. Ed. 2d 815, 86 S. Ct. 836 (1966); see also *Drope v. Missouri*, 420 U.S. 162, 43 L. Ed. 2d 103, 95 S. Ct. 896 (1975).

Long before the Supreme Court's pronouncement in *Pate*, Illinois recognized that the denial of an opportunity to sustain a plea of insanity is itself a denial of the safeguard of due process. In *Brown v. People*, 8 Ill. 2d 540, 545, 134 N.E.2d 760 (1956), this court held that "it [is] the duty of the court, when a *bona fide* issue of sanity [is] raised, to determine that issue." See also *People v. Burson*, 11 Ill. 2d 360, 370, 143 N.E.2d 239 (1957). The failure to observe procedures adequate to protect a defendant's right not to be tried while unfit deprive him of due process. *People v. Murphy*, 72 Ill. 2d 421, 430, 21 Ill. Dec. 350, 381 N.E.2d 677 (1978).

Illinois jealously guards an incompetent criminal defendant's fundamental right not to stand trial. The comprehensiveness of our statutory provisions concerning fitness for trial, to plead or be sentenced serve to illustrate this point. See 725 ILCS 5/104-10 *et seq.* (West 1992). Indeed, the right not to stand trial while incompetent [*157] is sufficiently important to merit protection even if the defendant has failed to make a timely request for

a competency determination. See 725 ILCS 5/104-11(a) (West 1992) (issue of fitness for trial, to plead, or to be sentenced may be raised by the defense, the State, or the court at any appropriate time before a plea is entered or before, during, or after trial); see also *Pate,* 383 U.S. 375, 15 L. Ed. 2d 815, 86 S. Ct. 836. Furthermore, where it is shown that at the time of trial certain facts existed which, had they been known to the circuit court at the time of trial, would have raised a *bona fide* doubt of fitness, the issue of fitness may be properly raised in a petition for post-conviction relief. See *People v. Smith*, 44 Ill. 2d 82, 254 N.E.2d 492 (1969); *People v. McLain*, 37 Ill. 2d 173, 226 N.E.2d 21 (1967); *People v. Harris*, 113 Ill. App. 3d 663, 69 Ill. Dec. 506, 447 N.E.2d 941 (1983).

With these principles in mind, we consider the merits of defendant's due process claim. Defendant contends that the State's failure to disclose that it administered psychotropic medication to him during the course of trial deprived him of a fitness hearing and, thus, due process of law. The State does not dispute defendant's assertions concerning the medication but, instead, raises challenges designed either to defeat our consideration of the claim or to deny the grant of a new trial.

Examination of the record reveals that defendant's trial took place between August 31 and October 25, 1988. Entries on defendant's "Medication Log Sheet," which is included as an exhibit to the post-conviction petition, identify Tranxene as medication, and indicate the dates, times and by whom the medication was administered. According to the log sheet, Tranxene was generally administered to defendant three times daily—once in the morning, again at midday, and a third time in the evening. The first entry on the log sheet indicates that ad-

ministration of the drug began July 16, 1988. After [*158] the morning dosage on August 29, no medication is recorded as having been given again until September 2, when daily administration was resumed. No medication was given on the morning of September 27 and medication was "refused" on the evenings of October 13, 19, 20, and from October 22 through 24. No entries appear on the log sheet beyond the morning dosage administered on October 28, 1988.

Also included as an exhibit to the petition is the affidavit of Dr. James O'Donnell, a licensed pharmacist. In his affidavit, Dr. O'Donnell states that he has conducted extensive research on the effects of Tranxene and other drugs on the human body. He describes Tranxene as a "valium replacement/central nervous system depressant" used for the management of anxiety disorders or for short term relief of the symptoms of anxiety. Dr. O'Donnell states that the possible side effects of the drug are drowsiness, confusion, depression, nervousness and substantial disorientation. Taken at certain doses, Tranxene could effect any individual's ability to make certain decisions.

Additionally, we note defendant's affidavit in which he states that he was unaware that he was being medicated. In this appeal, defendant posits that the fact that he was unaware or could not remember that he was being given psychotropic drugs may itself reflect the severe affects of the drug on his mental processes. Finally, defense counsel's affidavit states that he was unaware that defendant was being given drugs throughout the course of trial.

As his first basis in support of a new trial, defendant offers this court's opinion in *People v. Brandon,* 162 Ill. 2d 450, 205 Ill. Dec. 421, 643 N.E.2d 712 (1994), which construed section 104-21(a) of the Code of Criminal Procedure of 1963 (725 ILCS 5/104-21(a) (West 1992)). During the time of defendant's trial and direct appeal, section 104-21(a) provided: [*159]

> "A defendant who is receiving psychotropic drugs or other medications under medical direction is entitled to a hearing on the issue of his fitness while under medication." Ill. Rev. Stat. 1991, ch. 38, par. 104-21(a).

In *Brandon,* a majority of this court observed that section 104-21(a) evinced a recognition by the General Assembly that psychotropic medication is an important signal that a defendant may not be competent to stand trial. Rejecting the State's arguments to the contrary, the court held that where a defendant is being medicated with psychotropic drugs, the court has no discretion to decide whether to have a fitness hearing. Rather, section 104-21(a) mandates a fitness hearing. Because defendant Brandon had been administered psychotropic drugs during the time of his trial and sentencing and the trial court, "in the exercise of its discretion," denied him a fitness hearing, reversal of the defendant's convictions was required.

More recently, we have reaffirmed the holding in *Brandon.* Further, since *Brandon,* this court has recognized that the legislature equates the administration of psychotropic drugs with a *bona fide* doubt of sanity. See *People v. Gevas,* 166 Ill. 2d 461, 211 Ill. Dec. 511, 655 N.E.2d 894 (1995); see also *People v. Kinkead,* 168 Ill. 2d 394, 660 N.E.2d 852, 214 Ill. Dec. 145 (1995).

The State rejects *Brandon* as applicable in this case. In support, the State points out that the underlying claim in *Brandon* was ineffective assistance of counsel. Here, since no ineffectiveness claim is asserted, the constitutional foundation for post-conviction relief is absent. That defendant was precluded from having a fitness hearing pursuant to section 104-21(a), the State contends, amounts to no more than a statutory violation not cognizable under the Post-Conviction Act.

True, the violation of a statute or rule of procedure which does not constitute a deprivation of constitutional rights may not be considered under the Post-Conviction Act. 725 ILCS 5/122-1 (West 1992); *People v.* [*160] *Hangsleben*, 43 Ill. 2d 236, 239, 252 N.E.2d 545 (1969); *People v. Orndoff*, 39 Ill. 2d 96, 99, 233 N.E.2d 378 (1968). Further, the burden to establish such a deprivation rests on the defendant. *People v. Silagy*, 116 Ill. 2d 357, 365, 107 Ill. Dec. 677, 507 N.E.2d 830 (1987). Absent such a showing, a petition may be dismissed without an evidentiary hearing. *Silagy*, 116 Ill. 2d at 365. We believe, however, that defendant has met his burden.

As we have stated, the scope of the right not to be tried while unfit includes the right to an adequate procedure for inquiry into the issue of fitness. See *Murphy*, 72 Ill. 2d at 430. In *Pate*, the Court held that the Illinois court's failure to invoke the relevant statutory procedures deprived the defendant of an inquiry concerning his fitness to stand trial. Thus, the defendant suffered a due process violation.

We recognize that due process does not mandate any particular procedure for the inquiry; it requires merely

that there be an adequate procedure to implement the right to an inquiry. See *Drope*, 420 U.S. 162, 43 L. Ed. 2d 103, 95 S. Ct. 896. Thus, in this case, if, at the time of defendant's trial, the court had known that defendant was being administered psychotropic drugs, the court would have been dutybound to invoke adequate procedures which would have afforded defendant the opportunity for an inquiry on the issue of his fitness. See *Brandon*, 162 Ill. 2d at 459. The particular procedure to be invoked is purely by legislative design.

Here, the relevant statutory procedure provides for a fitness hearing. Although defendant's right to that particular procedure is wholly statutory, his right to inquiry concerning fitness flows from the due process guarantee. Compare *People v. House,* 202 Ill. App. 3d 893, 148 Ill. Dec. 627, 560 N.E.2d 1224 (1990) (right to be present at trial is founded in constitution; therefore, absence of notice pursuant to statute presents constitutional question), and *People v. Culp*, 127 Ill. App. 3d 916, 82 Ill. Dec. 548, 468 N.E.2d 1328 (1984) (noncompliance with Supreme [*161] Court Rule 402 does not raise constitutional issue unless violation rendered defendant's plea involuntarily made), with *People v. Maniatis*, 297 Ill. 72, 130 N.E. 323 (1921) (speedy-trial provision which provides that trial be commenced within given time period not coextensive with general constitutional guarantee against arbitrary and oppressive delays; thus, violation of speedy-trial provision does not necessarily rise to level of constitutional dimension).

Here, as in *Pate,* because no procedure was invoked, defendant was denied inquiry into the issue of his fitness. Due process was thereby denied. As such, defen-

dant's claim constitutes more than a statutory violation and is properly cognizable under the Post-Conviction Act.

As an additional challenge to defendant's claim, the State finds significant that the issue of defendant's fitness was not asserted either at trial or on direct appeal. In light of both defendant's and defense counsel's assertions of a lack of knowledge concerning defendant's being given the drugs, we find it not as significant. Further, to the extent that the State is suggesting waiver, we reject it out of hand. As we have stated, the right not to be tried while unfit is highly valued. Not even the failure to timely assert a fitness issue will cause the right to fall prey to the ordinary operation of procedural default. *McLain*, 37 Ill. 2d at 177; *Burson,* Ill. 2d at 3.

The State next argues that the trial court, which observed defendant's demeanor at trial and when defendant took the stand, did not *sua sponte* order a fitness hearing.

We perceive the State's argument to mean that, based upon these facts, we may presume defendant's fitness. The argument is not novel; it has been previously considered and rejected by this court. See *Brandon*, 162 Ill. 2d at 459-60, citing *Pate*, 383 U.S. at 386, 15 L. Ed. [*162] 2d at 822, 86 S. Ct. at 842; see also *Kinkead,* 168 Ill. 2d at 409. On these facts, we do so again today.

Finally, the State asserts that at a hearing on defendant's post-sentencing motion, defense counsel specifically testified that there was no indication that defendant was under the influence of drugs at the time he waived jury sentencing.

Notwithstanding counsel's perception, it remains an unrebutted fact that defendant was being medicated with

psychotropic drugs during the course of criminal proceedings against him. Counsel's perception alters neither that fact nor the resulting requirement for a fitness determination.

In his post-conviction petition, defendant has provided documentation to support his claim that he was administered psychotropic medication during the period of his plea, trial and sentencing. Pursuant to *Brandon, Gevas,* and *Kinkead*, the administration of these drugs to defendant raised a bona fide doubt of his fitness to stand trial. Thus, a fitness determination was constitutionally required.

Incidentally, since our decisions in *Brandon, Gevas* and *Kinkead*, the legislature has amended section 104-21(a) to provide that no fitness hearing is required unless the court finds that there is a *bona fide* doubt of the defendant's fitness. Pub. Act 89-428, @ 605, eff. December 13, 1995, amending 725 ILCS 5/104-21(a). The State does not suggest that the statute, as amended, has application in these proceedings.

Nevertheless, we find it appropriate to note the rule that amendatory acts which are procedural in nature have retrospective operation for matters which are *pending* on the effective date of the amendment or are subsequently filed. 82 C.J.S. *Statutes* @ 432 (1953); see also *Hogan v. Bleeker*, 29 Ill. 2d 181, 184, 193 N.E.2d 844 (1963). As this is a collateral matter, the amendment, though procedural [*163] in nature, does not apply. *Cf. Eddmonds,* 143 Ill. 2d at 523 (post-conviction petitioner not entitled to fitness hearing under section 104-21 of statute since he was not receiving medication when that statute became effective). Further, while the General

Assembly can pass legislation to prospectively change a judicial construction of a statute if it believes that the judicial interpretation was at odds with legislative intent, it cannot effect a change in that construction by a later declaration of what it had originally intended. See *People v. Rink*, 97 Ill. 2d 533, 541, 74 Ill. Dec. 34, 455 N.E.2d 64 (1983); *In re Marriage of Cohn*, 93 Ill. 2d 190, 202-04, 66 Ill. Dec. 615, 443 N.E.2d 541 (1982); *Roth v. Yackley*, 77 Ill. 2d 423, 428-29, 33 Ill. Dec. 131, 396 N.E.2d 520 (1979).

It remains only to state what remedy is due this defendant. Where there exists a *bona fide* doubt of fitness and no fitness hearing is held, a new trial is the appropriate remedy. Defendant had no opportunity for such a hearing. Therefore, defendant's convictions must be reversed, and this cause remanded for a new trial.

The State argues that the "automatic reversal" rule of *Brandon*, *Gevas* and *Kinkead* is flawed and should be abandoned. The State suggests that a more prudent approach would involve a remand for inquiry into the properties of the particular drug, whether it was properly prescribed and whether the dosage administered could have affected the defendant's ability to understand the nature and purpose of the proceedings. If the defendant is able to demonstrate that the administered medication rendered him unfit for trial, he would then be entitled to a new trial. A new trial based on any less of a showing, the State asserts, would result in a tremendous waste of judicial and prosecutorial resources.

We agree with the State that inquiry should properly be had on the issue of the nature and properties of the drug, its dosage and effect on the defendant's ability to

[*164] understand and participate in his defense. The point at which we diverge is the validity of such an "after-the-fact" determination. We note here, as we did in *Gevas*, that "there are 'inherent difficulties' in attempting a retrospective '*nunc pro tunc* determination' of defendant's mental competency [**18] even 'under the most favorable circumstances.' " *Gevas*, 166 Ill. 2d at 471, quoting *Drope*, 420 U.S. at 183, 43 L. Ed. 2d at 119-20, 95 S. Ct. at 909.

Moreover, "automatic reversal" for the failure to have a fitness hearing is not a new concept in Illinois. Even before *Brandon* and its progeny, where a requisite fitness hearing was not provided, reversal was deemed the appropriate remedy. See, *e.g.*, *McLain*, 37 Ill. 2d 173, 226 N.E.2d 21; *People v. Bender*, 27 Ill. 2d 173, 188 N.E.2d 682 (1963); *Burson*, 11 Ill. 2d 360, 143 N.E.2d 239; *Brown*, 8 Ill. 2d 540, 134 N.E.2d 760. Finally, we are cognizant of the costs and burdens which, as a result of this disposition, must be borne by our criminal justice system. However, not even our greater interest in the finality of judgments can outweigh the safeguarding of a defendant's right not to be tried while unfit.

At the time of defendant's trial and appeal, section 104-21(a), as construed in *Brandon, Gevas* and *Kinkead,* required that defendant be given a fitness hearing. As we have rejected any notion that a *nunc pro tunc* determination of fitness can provide the necessary reliability (see *Brown*, 8 Ill. [**19] 2d 540, 134 N.E.2d 760; see also *Pate*, 383 U.S. 375, 15 L. Ed. 2d 815, 86 S. Ct. 836), consistent with the reasoning and holdings in *Brandon, Gevas* and *Kinkead,* reversal of defendant's convictions and sentence is required.

As an alternative basis to support the grant of a new trial, defendant contends that the State, by its failure to disclose information concerning administration of the medication, violated the dictates of *Brady v. Maryland*, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963) [*165] (holding that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment). Given our determination that defendant is entitled to a new trial based upon a violation of his right to an inquiry on the issue of his fitness, we do not address defendant's *Brady* claim. But see *People v. Sanchez*, 169 Ill. 2d 472, 662 N.E.2d 1199, 215 Ill. Dec. 59 (1996).

CONCLUSION

Defendant has established a constitutional deprivation. Thus, dismissal of his post-conviction petition was not proper. The order of dismissal is therefore reversed, and the cause is remanded with directions to set aside the conviction and to [**20] grant a new trial.

Reversed and remanded with directions.

JUSTICE MILLER, dissenting:

I do not agree with the majority's conclusion that the defendant is entitled to relief under the Post-Conviction Hearing Act (725 ILCS 5/122-1 through 122-7 (West 1992)). A post-conviction remedy is available only if the defendant demonstrates a substantial deprivation of constitutional rights. 725 ILCS 5/122-1, 122-2 (West 1992); *People v. Ruiz*, 132 Ill. 2d 1, 9, 138 Ill. Dec. 201, 547 N.E. 2d 170 (1989). Because the present claim lacks a constitutional foundation, it should be dismissed.

For the reasons stated in my previous dissents, I continue to believe that the right provided by section 104-21(a) of the Code of Criminal Procedure of 1963 (725 ILCS 5/104-21(a) (West 1992)) cannot be equated with a *bona fide* doubt of fitness and is statutory rather than constitutional in force and effect. *People v. Birdsall*, 1996 Ill. LEXIS 75, No. 77259 (June 20, 1996) (Miller, J., dissenting, joined by Bilandic, C.J., and Heiple, J.); *People v. Kinkead*, 168 Ill. 2d 394, 417, 660 N.E.2d 852, 214 Ill. Dec. 145 (1995) (Miller, J., dissenting, joined by Bilandic, C.J., and Heiple, J.); *People v. Gevas*, 166 Ill. 2d 461, 472, [**21] [*166] 211 Ill. Dec. 511, 655 N.E.2d 894 (1995) (Miller, J., dissenting, joined by Bilandic, C.J., and Heiple, J.); *People v. Brandon*, 162 Ill. 2d 450, 461, 205 Ill. Dec. 421, 643 N.E.2d 712 (1994) (Miller, J., dissenting, joined by Bilandic, C.J., and Heiple, J.). While the defendant correctly observes that the arbitrary denial of a statutory right may give rise to a due process violation (*Hicks v. Oklahoma*, 447 U.S. 343, 65 L. Ed. 2d 175, 100 S. Ct. 2227 (1980)), that principle is of no assistance to him here. The defendant never sought a hearing under section 104-21(a), and the trial judge in this case did nothing that was contrary to the terms of the statute. It

should be noted that the defendant does not contend that counsel was ineffective for failing to raise this issue during the trial proceedings.

The right now being asserted by the defendant is wholly statutory and therefore cannot form the basis for post-conviction relief. By finding a constitutional deprivation where none exists, today's decision grants a windfall to post-conviction litigants, who now can raise for the first time in a post-conviction petition matters that should have been raised instead in the original [**22] trial proceedings.

CHIEF JUSTICE BILANDIC and JUSTICE HEIPLE join in this dissent.

APPENDIX B

SUPREME COURT OF ILLINOIS
SUPREME COURT BUILDING
SPRINGFIELD 62701

September 30, 1996

Hon. Jim Ryan
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No. 77549 - People State of Illinois, appellee, v. Richard C. Nitz, appellant. Appeal, Circuit Court (Williamson)

The Supreme Court today DENIED the petition for rehearing in the above entitled cause.

The mandate of this Court will issue to the appropriate Appellate Court/or Circuit Court or other agency on October 10, 1996.

APPENDIX C

CASES RAISING *BRANDON* ISSUE
AS OF DECEMBER 5, 1996
(Includes Cases in Which Relief
Has Already Been Granted)

ADAMS COUNTY

Illinois Appellate Court (4th District)
People v. Steven A. Hanna, No. 4-95-0881 (direct appeal)

ALEXANDER COUNTY

Illinois Appellate Court (5th Dist.)
People v. Loren Ethridge, No. 5-94-0107 (post-conviction appeal)

BUREAU COUNTY

Circuit Court
People v. Jeffrey Rissley, No. 91 CF 92 (capital) (state post-conviction)

COOK COUNTY

Illinois Appellate Court (1st District)
People v. Patricia Johnson, No. 94-294 (direct appeal)
People v. Vasean Grey, No. 94-1933 (direct appeal)
People v. Sidney Smith, No. 94-1955 (post-conviction appeal)
People v. Ellis Henderson, No. 94-2800 (direct appeal)
People v. Dennis Potts, No. 94-2925 (direct appeal)
People v. Chandell Leaks, No. 94-3314 (direct appeal)
People v. Richard Barnes, No. 94-4089 (direct appeal)

People v. Harold Hill, No. 94-4280 (direct appeal)
People v. Shirely Ferguson, No. 95-211 (direct appeal)
People v. Decount Bell, No. 95-376 (direct appeal)
People v. Willie Overstreet, No. 95-408 (direct appeal)
People v. Lincoln Jones, No. 95-492 (direct appeal)
People v. Juan Lome, No. 95-725 (direct appeal)
People v. Jermaine Webb, No. 95-1505 (direct appeal)
People v. Antoine Spicer, No. 95-2454 (direct appeal)
People v. David Gregory, No. 95-3588 (direct appeal)
People v. Wilber Anderson, No. 96-164 (direct appeal)
People v. John Redd, No. 96-935 (direct appeal)
People v. Porfirio Guttierez, No. 91-2909 (direct appeal)

Illinois Supreme Court

People v. Leonard Kidd, No. 76490 (capital) (direct appeal)
People v. David Gevas, No. 75604 (capital) (direct appeal)

Circuit Court[1]

DEKALB COUNTY

Illinois Supreme Court

People v. Jeffrey McKay, No. 81919 (State's PLA, filed following appellate court's remand for factfinding on psychotropic drug issue, denied 12/4/96)

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[1] Cook County State's Attorney's Office reported that it was not possible to calculate the exact number of psychotropic medication cases on post-conviction review because the county is comprised of hundreds of courtrooms, and many post-conviction petitions are summarily dismissed without involvement by the State's Attorney's Office. Additionally, the county has no means of computer checking the issues actually raised in its thousands of cases.

DUPAGE COUNTY

Illinois Appellate Court (2nd District)
People v. Michael Circelli, No. 2-95-1485 (direct appeal)

Circuit Court
People v. Albert Adamcyk, No. 92 CF 261 (pled out on post-conviction review)

FAYETTE COUNTY
Illinois Appellate Court (5th Dist.)
People v. Garry Ulbright, No. 5-94-0728 (direct appeal)

GRUNDY COUNTY

Circuit Court
People v. Edward Moore, No. 91 CF 54 (capital) (post-conviction)
People v. Robert W. Nelson, No. 94 CF 131 (post-conviction)

HENRY COUNTY

Illinois Supreme Court
People v. Raymond Burgess, No. 79162 (capital) (direct appeal)

JACKSON COUNTY

Illinois Appellate Court (5th Dist.)
People v. Gregory Cawthon, No. 5-96-0104 (post-conviction)

JEFFERSON COUNTY

Circuit Court

People v. Thomas Odle, No. 85 CF 223 (capital) (post-conviction)

People v. William T. Jones, No. 82 CF 79 (capital) (second post-conviction petition)

KANE COUNTY

Illinois Supreme Court

People v. Jerry Mitchell, No. 81128 (State's PLA, filed following appellate court's reversal of conviction, denied 10/2/96)

KANKAKEE COUNTY

Circuit Court

People v. Nancy Rish, No. 87 CF 32 (natural life) (post-conviction)

KENDALL COUNTY

Illinois Appellate Court (2nd District)

People v. Charles Parker, No. 93 CF 66/67; No. 2-96-1210 (direct appeal)

LAKE COUNTY

Illinois Supreme Court

People v. Hector Sanchez, No. 76616 (capital) (issue raised for first time in Petition for Rehearing—denied 4/1/96)

Illinois Appellate Court (2nd District)

People v. Devon Witherspoon, No. 2-94-0727 (direct appeal)

People v. Larry Simpson, No. 2-95-0109 (direct appeal)
People v. John Steinmetz, No. 2-94-1341 (direct appeal)

Circuit Court
People v. Johnny Neal, No. 82 CF 1212 (capital) (second post-conviction petition denied 11/96—defendant will appeal to Illinois Supreme Court)

LIVINGSTON COUNTY

Illinois Supreme Court
People v. John Sandham, No. 80130 (direct appeal) (conviction reversed on other grounds)

MADISON COUNTY

Illinois Appellate Court (5th District)
People v. Gerald Bassett, No. 5-95-0026 (direct appeal)

Circuit Court
People v. Remon Casa Williams, No. 93 CF 1822 (capital) (post-conviction)

MASON COUNTY

Illinois Supreme Court
People v. Scotty Lee Kinkead, No. 75236 (capital) (direct appeal)

Circuit Court
People v. Leslie Palmer, No. 92 CF 16 (capital) (post-conviction)

McLEAN COUNTY

Circuit Court
People v. Glenn Wilson, No. 91 CF 156 (capital) (post-conviction)

MONTGOMERY COUNTY

Circuit Court

People v. John Sherman Cole, No. 93 CF 14 (capital) (post-conviction)

PEORIA COUNTY

Illinois Appellate Court (3rd District)

People v. Emmitt K. Sanders, No. 3-95-0294 (direct appeal)

Circuit Court

People v. Jimmy Ray Pitsonbarger, No. 87 CF 443 (capital) (post-conviction)

People v. Winifred M. Jones, No. 91 CF 881 (post-conviction)

People v. James R. Snyder, No. 95 CF 746 (withdrawal of guilty plea)

People v. David W. Adams, No. 92 CF 580 (post-conviction)

PERRY COUNTY

Circuit Court

People v. Joe Dunning, No. 96-CF-70 (withdrawal of guilty plea)

RANDOLPH COUNTY

Illinois Appellate Court (5th Dist.)

People v. Mary L. Jones, No. 5-94-0603 (direct appeal)

ROCK ISLAND COUNTY

Illinois Supreme Court
People v. Erik Birdsall, No. 77259 (direct appeal)

Circuit Court
People v. Robert Johnson, No. 94 CF 521 (post-conviction)
People v. William Horton, No. 93 CF 462 (post-conviction)

ST. CLAIR COUNTY

Illinois Appellate Court (5th Dist.)
People v. Raymond Marcinia, No. 5-96-0231(direct appeal)
People v. Timothy Hayden, No. 5-96-0185 (post-conviction)

Circuit Court
People v. Andre Jones, No. 79 CF 285 (capital) (third post-conviction petition)
People v. Anthony Mitchell, No. 89 CF 515 (capital) (post-conviction)

STEPHENSON COUNTY

Circuit Court
People v. Ronald Burt, No. 91 CF 49 (capital) (post-conviction)

TAZEWELL COUNTY

Circuit Court
People v. Donald Quickle, Nos. 94 CF 30, 94 CF 48 (post-conviction)

VERMILION COUNTY

Circuit Court
People v. Charles Silagy, No. 80 CF 47 (capital) (second post-conviction petition)

WAYNE COUNTY

Illinois Appellate Court (5th Dist.)
People v. Tobias Bye, No. 5-94-0615 (post-conviction)

WILL COUNTY

Illinois Supreme Court
People v. Tyrone Brandon, No. 73659 (direct appeal)

U.S. District Court (federal habeas)
U.S. ex rel. Tafford Holman v. Gilmore, No. 95 C 5035 (capital)

WILLIAMSON COUNTY

Illinois Supreme Court
People v. Richard Nitz, No. 77549 (capital) (post-conviction)

WINNEBAGO COUNTY

Illinois Appellate Court (2nd District)
People v. Melvin Smiley, No. 2-93-1348 (direct appeal)

APPENDIX D

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SECTION: METRO CHICAGO; Pg. 1; ZONE: N

HEADLINE: MENTAL FITNESS EXAMS TAXING COURT SYSTEM

By Maurice Possley, Tribune Staff Writer.

The already-burdened Cook County Criminal Court system is becoming even more backlogged as judges are ordering mental fitness examinations in record numbers for defendants taking psychiatric medication.

Driven by court rulings and a hole in state law, judges have been ordering fitness examinations for every inmate who is taking psychotropic medications, which are used to treat a variety of mental conditions.

The court-ordered exams have created delays of several months in the prosecution of criminal cases, resulting in increased costs for the jail system and a burden on the court's clinical services arm.

The delays are fueled not only by the paucity of county psychiatrists available to conduct examinations, but by the apparent willingness of physicians associated with the Cook County Jail to administer these powerful drugs to inmates for reasons that include an inability to fall asleep.

A judge, who spoke on the condition of anonymity, said, "The way they're giving this stuff out (at the jail), it's causing a tremendous load on the system.

"If I was charged with murder and being held in County Jail, I'd sure be anxious and have trouble sleeping," he said. "But why do they have to give them thorazine, why not something else? Why wouldn't you try a non-prescription drug?"

Leonard Bersky, chief operating officer of Cermak Health Services, the medical arm of the jail, said all inmates at the jail undergo a psychiatric assessment when they enter the facility and psychiatrists are responsible for prescribing medication as they believe it is needed. He declined to be more specific, citing patient confidentiality laws.

How many of the 8,000 jail inmates are on psychiatric medication at any given time? That depends on who's doing the estimating.

Bersky said only about 10 percent, while the Cook County state's attorney's office puts the figure at 60 to 70 percent.

Court officials say that normally about 2,000 to 3,000 fitness exams are done, putting the figure closer to 25 percent after factoring in that not all involve defendants taking psychiatric medication.

The legal issue centers on determining whether a defendant who is on psychotropic medication is required as a matter of law to undergo a fitness exam before going to trial.

It is a situation that appears to be unique to Illinois and was initially sparked in 1994 when the Illinois

Supreme Court held that a defendant receiving psychotropic medicine must be granted a fitness hearing if his attorney requests one.

At that time, the fitness statute had two separate clauses. In cases that did not involve psychotropic drugs, judges were required to have a "bona fide doubt" about a defendant's mental fitness, while in the cases involving medication, defendants were "entitled" to such hearings.

Then, in March 1995 the Supreme Court reversed the guilty plea and death sentence imposed on David Gevas, a Riverside man who murdered his twin children by hurling them against a wall. The court sent the case back for a fitness hearing because Gevas was on psychotropic medication when he entered his guilty plea and a request for an exam by his lawyer had been denied by the trial court.

In essence, the high court's rulings on the subject were interpreted to mean that the statute mandates a fitness hearing when a defendant was taking such medication. The situation was troubling to judges, who struggled to determine what course to follow, and for prosecutors faced with the difficult task of reassembling their evidence and relocating witnesses years after the initial trial.

The Illinois General Assembly responded in December 1995 by amending the fitness statute to require that judges have a bona fide doubt about fitness in all cases, including those where the defendant is taking psychotropic medication, before ordering an examination.

But that amendment, which was part of a larger bill, was wiped out by another court ruling involving the constitutionality of that bill.

The amendment was redrafted and is expected to reach the desk of Gov. Jim Edgar before the end of the year.

The impact of the legal quagmire was described in part in a letter sent to Edgar by Cook County State's Atty. Jack O'Malley urging the governor to sign the bill amending the statute.

"The current judicial rule requiring fitness hearings whenever a defendant is taking a psychotropic drug wastes valuable court time and forces county governments and citizens to pay for the costs of expert witnesses and the salaries of government personnel involved in the hearings," the letter stated.

"It is an administrative nightmare," said Dr. Mathew Markos, clinical director of Forensic Clinical Services, the arm of the Cook County Circuit Court that conducts fitness examinations.

"When we get backlogged, the courts get backlogged," he said, explaining that the increased orders for fitness exams has overwhelmed his staff of four full-time and three part-time psychiatrists.

"Our work has skyrocketed," Markos said. "We need more staff."

He said court psychiatrists usually conduct somewhere between 2,000 and 3,000 fitness exams annually and testify in court about 500 times.

With an increasing demand for exams, inmates must wait longer to see a court psychiatrist—what was once a two- to three-week wait, now is six to eight weeks.

Depending on the findings, the process gets extended even longer when a defense lawyer asks for an examina-

tion by a private psychiatrist and a judge has to decide whether to hold a full hearing involving testimony from the physicians.

Markos estimated "a vast majority" of defendants are presently taking psychotropic medication. "It's given out as a sleeping pill," he said. "It's a hornet's nest involving hundreds and hundreds of cases."

Psychotropic medicine is divided roughly into four categories: anti-depressants, which include drugs such as Prozac and are used to treat depression; anti-psychotics, such as Thorazine which are used to treat psychotic conditions such as hallucinations; mood stabilizers, such as lithium; and anxiolytics, such as Valium and Xanax, to prevent anxiety.

Earlier this year, Cermak psychiatrist Dr. Choong Hun Lee provided some insight on how psychotropic medicine is dispensed at the jail when he testified during a fitness hearing for a man accused of murder.

Lee said that he prescribes a psychotropic drug to inmates after an interview as brief as five minutes and to inmates who are not psychotic, but merely complain of having trouble sleeping.

In fact, Lee said, inmates don't necessarily have to be displaying signs of a mental illness.

"My role is, as I said, to help the patient just feel better," Lee testified. "So I assume by giving him some medication he can adjust better, behave better."

Even with the effort to amend the statute governing fitness exams, some judges worry that the changes may not be enough.

By relying on a judge to find a bona fide doubt as to fitness, judges, in effect, must act as psychiatrists. In addition, the act has no objective standards for determining whether a doubt exists.

That's a problem, said Criminal Court Judge Daniel Locallo.

"Psychotropic medications are potent drugs and their effect on the mind and behavior of an accused may not be easily determined or fully understood, particularly by non-medical personnel," he said.

"I believe that psychiatrists and physicians are in a better position than judges or lawyers in determining whether a person understands the nature of the proceedings or can communicate with his attorney," Locallo said.

As a precaution, Locallo has been ordering fitness exams in any case where defendants are taking psychotropic medication.

"Is it better to delay initially to allow for a fitness hearing versus not doing a hearing and 1 1/2 to two years later having a new trial?" he asked. "By doing a fitness hearing now, that issue is over."